PP

v.

DATO' SERI ANWAR IBRAHIM

COURT OF APPEAL, PUTRAJAYA
RAMLY ALI JCA
ROHANA YUSUF JCA
MOHD ZAWAWI SALLEH JCA
[CRIMINAL APPEAL NO: W-05-19-01-2012]
11 OCTOBER 2013
[2014] CLJ JT(1)

CONSTITUTIONAL LAW: *Public Prosecutor - Powers and functions - Power to appoint Deputy Public Prosecutor - Whether could appoint advocate as Deputy Public Prosecutor - Federal Constitution, art. 145(3) - Criminal Procedure Code, ss. 376(3), 378 & 379*

CRIMINAL PROCEDURE: *Public Prosecutor - Powers and functions - Power to appoint Deputy Public Prosecutor - Whether could appoint advocate as Deputy Public Prosecutor - Federal Constitution, art. 145(3) - Criminal Procedure Code, ss. 376(3), 378 & 379*

CRIMINAL PROCEDURE: *Prosecution - Appeal - Conduct of - Prosecution of appeal conducted by advocate appointed as Deputy Public Prosecutor by Public Prosecutor - Whether legally proper - Whether appointment valid - Whether Public Prosecutor empowered to make appointment - Criminal Procedure Code, ss. 376(3), 378 & 379*

STATUTORY INTERPRETATION: *Statutes - Repeal - Repeal by way of abandonment of use - Criminal Procedure Code, s. 379 - Whether lapsed by effluxion of time - Power to enact and repeal statutes - Whether resides in legislative body - Doctrine of desuetude - Whether applicable in Malaysia - Federal Constitution, art. 66*

The Public Prosecutor ('PP') had appealed against the decision of the High Court in acquitting and discharging the respondent of an offence under s. 377C Penal Code and, for that purpose, had appointed an advocate ('Dato Seri Shafee') as a Deputy Public Prosecutor ('DPP') to prosecute the appeal before the Court of Appeal. The respondent alleged that the appointment of Dato' Seri Shafee, made as it were under s. 376(3) Criminal Procedure Code ('CPC'), was a nullity, and in the circumstances, having

A applied to disqualify him from appearing in the appeal or acting as counsel on behalf of the PP, mounted the following arguments before the appellate judges here, namely: (i) that there is now a complete prohibition on advocates to appear on behalf of the PP in criminal proceedings, since s. 378 of the CPC, as amended, had B done away with the words 'an advocate expressly authorised in writing by the Public Prosecutor can appear on behalf of the Public Prosecutor' appearing in the old s. 378; (ii) that s. 379 of the CPC, which speaks of an appointment of an advocate as a DPP by way of the fiat of the PP, has not been invoked for such C a considerable duration of time that it has now become obsolete by the doctrine of desuetude; and (iii) that Dato' Seri Shafee's appointment was vitiated by conflict of interest as Dato' Seri Shafee, having given a statement to the police under s. 112 of the CPC in respect of the trial, is a material witness for the unfolding D of the narratives of the prosecution's case.

Held (dismissing application; ruling appointment valid and lawful):
Per Rohana Yusuf JCA delivering the judgment of the court:

E **(1)** The power of the PP to institute, conduct or discontinue any proceeding for an offence is prescribed by art. 145(3) of the Federal Constitution. As for the CPC, there are two main provisions which deal with appointments which the PP is F empowered to make in relation to criminal proceedings, namely ss. 376(3) and 379. By virtue of s. 376(3), the PP may appoint fit and proper persons to be DPPs, and a DPP so appointed may exercise all or any of the rights and powers vested under the law unless the law expressly states that such power had to be exercised by him personally. Under s. 379, G by fiat of the PP, an advocate may be employed by the Government to conduct criminal prosecution or inquiry or to appear in any criminal appeal on point of law reserved to the PP. (paras 9 & 10)

H **(2)** The applicant respondent, in contending that an advocate could no longer appear on behalf of the PP, merely focused on the prohibitive provision of s. 378. However, whilst legislative provisions must first be given their plain meaning, each provision of the law cannot be interpreted in isolation. I Section 378 must thus be interpreted in the light of other

provisions. By highlighting the prohibition under s. 378 alone, the respondent had ignored the existence of s. 376(3) which authorises the appointment of a fit and proper person to be a DPP. (paras 12-14)

(3) Section 378 of the CPC does not prohibit a person who is appointed under s. 376(3) of the Code from appearing on behalf of the PP because, by the appointment, he is to all intents and purposes a DPP. Dato' Seri Shafee's appointment herein was made under s. 376(3) CPC and, as a DPP, he may exercise all or any of the rights and powers vested under the law except those which had been specifically reserved for the PP. (paras 12-15)

(4) The doctrine of desuetude cannot apply to s. 379 of the CPC particularly as to the length of the period that this provision had been neglected or abandoned or not been in operation. The appointment of an advocate, one Dato' Tan Hock Chuan, as a DPP pursuant to s. 379 in 2009 to conduct the public inquiry in *Teoh Beng Hock*'s case showed that, far from being abandoned, s. 379 was in operation as recent as four years ago. (*Teoh Beng Hock*'s case was reported in Sessions & Magistrates' Cases at [2012] 1 SMC 19 – Editor). (para 20)

(5) The doctrine of desuetude, in any case, does not apply to the laws of Malaysia. In Malaysia, the law-making process is found in art. 66 of the Federal Constitution. The Legislative body is conferred with the power to legislate laws, which would necessarily include the power to repeal any law. And, for a legislation to lose its applicability, it must be specifically repealed by Parliament. It cannot impliedly be repealed simply by the flow of time or inactive use. There has been no recognition of the principle where a statute may lose its force merely through disobedience and lack of enforcement over a long period of time. (paras 18-25)

(6) The appeal to be prosecuted in the present case would purely be deliberated on the appeal records before the court. It must also be noted that after a full trial at the High Court, Dato' Seri Shafee was neither called by the prosecution nor the defence. It would not be wrong then to infer that he was therefore not a material witness to unfold the narratives of the

A prosecution's case. The fact that he was offered as a defence witness was because his statements were recorded under s. 112 CPC. But even if his statements were recorded under s. 112 CPC, it did not *ipso facto* make him a material witness. The prosecution is duty bound to offer persons whose
B statements were recorded under s. 112 simply to avoid the adverse inference under s. 114(g) of the Evidence Act 1950. (para 31)

(7) Dato' Seri Shafee was clearly not a material witness to both
C the prosecution and the defence. The s. 112 statements recorded from Dato' Seri Shafee relate only to his presence at the house at the time when Mohd Saiful Bukhari met the Prime Minister. We did not see how he would be relevant to a charge of sodomy against the applicant respondent. The
D facts therein were just too fleeting to bear any relevance to a sodomy charge. Also, the fact that the trial was over and neither the prosecution nor the defence had adduced Dato' Seri Shafee's evidence, dispelled any thought of him being a material witness. (paras 32 & 34)

E ***Bahasa Malaysia*** *Translation Of Headnotes*

Pendakwa Raya ('PR') dalam kes ini telah merayu terhadap keputusan Mahkamah Tinggi kerana melepas dan membebaskan responden atas kesalahan di bawah s. 377(C) Kanun Keseksaan,
F dan untuk tujuan itu telah melantik seorang peguambela ('Dato' Seri Shafee') sebagai seorang Timbalan Pendakwa Raya ('TPR') bagi mendakwa rayuan di hadapan Mahkamah Rayuan. Responden mengatakan bahawa perlantikan Dato' Seri Shafee, yang dibuat di bawah s. 376(3) Kanun Tatacara Jenayah ('KTJ'), adalah tak sah
G dan batal, dan oleh yang demikian, setelah memohon supaya Dato' Seri Shafee dihalang dari menghadiri rayuan atau bertindak sebagai peguam bagi pihak PR, telah mengemukakan hujah-hujah berikut di hadapan hakim-hakim rayuan di sini, iaitu: (i) bahawa peguambela-peguambela kini adalah dilarang sepenuhnya dari hadir sebagai
H wakil kepada PR dalam prosiding jenayah, kerana s. 378 KTJ, seperti yang dipinda, telah membuang perkataan-perkataan "seorang peguambela atas kebenaran bertulis Pendakwa Raya boleh hadir sebagai wakil Pendakwa Raya" yang terkandung dalam s. 378 yang lama; (ii) bahawa s. 379 KTJ, yang menyentuhi perlantikan
I seorang peguambela sebagai TPR melalui fiat PR, telah tidak digunapakai untuk jangkamasa yang panjang sekaligus

menyebabkannya menjadi lapuk berdasarkan doktrin desuetude; dan (iii) bahawa perlantikan Dato' Seri Shafee dicemari konflik kepentingan disebabkan Dato' Seri Shafee sebelum ini telah memberi kenyataan s. 112 KTJ kepada polis berkaitan perbicaraan kes, dan adalah seorang saksi material bagi merungkai naratif kes pendakwaan.

Diputuskan (menolak permohonan; memutuskan pelantikan sah dan teratur)

Oleh Rohana Yusuf HMR menyampaikan penghakiman mahkamah:

(1) Kuasa PR untuk memulakan, menjalankan atau memberhentikan apa-apa prosiding berkaitan sesuatu kesalahan adalah ditetapkan oleh fasal 145(3) Perlembagaan Persekutuan. Berhubung dengan KTJ, terdapat dua peruntukan yang menangani soal perlantikan yang boleh dibuat oleh PR dalam kaitannya dengan prosiding jenayah, iaitu ss. 376(3) dan 379. Melalui s. 376(3), PR boleh melantik orang-orang yang layak dan sesuai sebagai TPR, dan seorang TPR yang dilantik sedemikian cara boleh melaksanakan kesemua atau mana-mana hak dan kuasa yang diberikan oleh undang-undang kecuali jika undang-undang menyatakan secara terus bahawa kuasa berkenaan perlu dilaksanakan sendiri oleh PR. Di bawah s. 379, melalui fiat PR, seorang peguambela boleh dilantik oleh Kerajaan untuk menjalankan prosiding atau inkuiri jenayah ataupun hadir di mana-mana rayuan jenayah atas persoalan undang-undang yang dirizabkan untuk PR.

(2) Pemohon responden, dalam menghujahkan bahawa seseorang peguambela tidak lagi boleh hadir bagi pihak PR, hanya memfokus kepada peruntukan larangan di dalam s. 378. Bagaimana pun, sementara peruntukan undang-undang perlu pertama sekali diberikan maksudnya yang jelas, setiap peruntukan undang-undang tidak boleh ditafsirkan dengan secara terasing. Seksyen 378 dengan itu hendaklah ditafsirkan secara yang berhubungan dengan peruntukan-peruntukan lain. Dengan menonjolkan semata-mata larangan di dalam s. 378, responden telah tidak memperdulikan s. 376(3) yang membenarkan perlantikan seorang yang layak dan sesuai sebagai seorang TPR.

(3) Seksyen 378 KTJ tidak melarang seorang yang dilantik di bawah s. 376(3) Kanun tersebut dari hadir bagi pihak PR kerana, melalui perlantikannya, beliau adalah bagi semua maksud seorang TPR. Perlantikan Dato' Seri Shafee di sini dibuat di bawah s. 376(3) KTJ dan, sebagai seorang TPR, beliau boleh melaksanakan kesemua atau mana-mana hak dan kuasa yang diberikan oleh undang-undang kecuali hak-hak dan kuasa-kuasa yang secara spesifik dirizab untuk PR.

(4) Doktrin desuetude tidak terpakai kepada s. 379 KTJ terutama atas alasan jangkamasa panjang di mana peruntukan ini dikatakan diabaikan, ditinggalkan atau tidak beroperasi. Perlantikan seorang peguambela, seorang Dato' Tan Hock Chuan, sebagai TPR di bawah s. 379 pada tahun 2009 untuk menjalankan inkuiri awam bagi kes Teoh Beng Hock menunjukkan bahawa, jauh dari ditinggalkan, s. 379 baharu saja digunapakai empat tahun lalu. (Kes *Teoh Beng Hock* ada dilapor di dalam Sessions & Magistrates' Cases di [2012] 1 SMC 19 – Editor).

(5) Doktrin desuetude walau apapun tidak terpakai kepada undang-undang Malaysia. Di Malaysia, proses pembuatan undang-undang termaktub dalam fasal 66 Perlembagaan Persekutuan. Badan perundangan telah diberi kuasa untuk menggubal undang-undang, yang sekaligus termasuk kuasa untuk membatalkan mana-mana undang-undang. Dan, untuk sesuatu undang-undang hilang keterpakaiannya, ianya hendaklah dibatalkan secara spesifik oleh Parlimen. Ia tidak boleh dibatalkan secara tersirat hanya melalui perjalanan masa atau ketidakgunaan. Tidak wujud pengiktirafan terhadap prinsip di mana sesuatu statut boleh hilang kuatkuasanya melalui ketidakpatuhan dan ketiadaan penguatkuasaan bagi jangkamasa yang panjang.

(6) Rayuan yang hendak dikendalikan dalam kes semasa akan hanya melibatkan pengupasan rekod rayuan di hadapan mahkamah. Ianya harus juga diingat bahawa selepas perbicaraan penuh di Mahkamah Tinggi, Dato' Seri Shafee telah tidak dipanggil sama ada oleh pihak pendakwaan mahupun pembelaan. Oleh itu, tidaklah salah untuk mengatakan bahawa beliau sebenarnya bukan merupakan seorang saksi material bagi merungkai naratif kes pendakwaan.

Fakta bahawa beliau telah ditawarkan sebagai saksi pembelaan adalah kerana kenyataan beliau telah direkodkan di bawah s. 112 KTJ. Pun begitu, jikapun kenyataannya direkodkan di bawah s. 112 KTJ, itu tidak *ipso facto* menjadikan beliau seorang saksi material. Pihak pendakwaan terpaksa menawarkan mereka yang mana kenyataannya direkodkan di bawah s. 112 semata-mata untuk mengelakkan pengenaan anggapan memudaratkan di bawah s. 114(g) Akta Keterangan 1950.

(7) Dato' Seri Shafee jelas bukan merupakan seorang saksi material kepada kedua-dua pendakwaan dan pembelaan. Kenyataan s. 112 yang direkodkan dari Dato' Seri Shafee hanyalah berkaitan kehadiran beliau semasa Mohd Saiful Bahari menemui Perdana Menteri. Maka kami tidak dapat melihat di mana relevannya beliau kepada pertuduhan liwat yang dikenakan terhadap pemohon responden. Fakta di situ adalah terlalu landai untuk menjadi relevan kepada satu pertuduhan liwat. Juga, fakta bahawa perbicaraan sudah selesai dengan kedua-dua pendakwaan dan pembelaan tidak mengemukakan keterangan Dato' Seri Shafee dengan sendirinya menolak pandangan bahawa beliau merupakan saksi material.

Case(s) referred to:
Bowman v. Secular Society Ltd [1917] AC 406 ***(refd)***
Brown v. Magistrate of Edinburgh [1931] SLT 456 ***(refd)***
Kayla Beverly Hills (M) Sdn Bhd & Anor v. Quantum Far East Ltd & Ors; Uma Devi R Balakrishnan (Third Party) [2003] 4 CLJ 587 HC ***(refd)***
Johnson Tan Han Seng v. PP & Other Appeals [1977] 1 LNS 38 FC ***(foll)***
Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn Bhd [2010] 2 CLJ 1061 HC ***(refd)***
PP v. Dato' Seri Anwar Ibrahim & Anor [2001] 3 CLJ 313 HC ***(refd)***
RS Muthiah v. Pembinaan Fiba Sdn Bhd [2004] 2 CLJ 917 HC ***(refd)***
Skyes v. Director of Public Prosecutions [1962] AC 528 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 376(1), (3), 378, 379, 418A
Evidence Act 1950, s. 114(g)
Federal Constitution, arts. 66, 145(3)
Legal Profession (Practice and Etiquette) Rules 1978, rr. 3(b)(ii), 5(a), 27(a)
Penal Code, s. 377C

Other source(s) referred to:
Black's Law Dictionary, 9th edn, p 513

A *For the prosecution - Muhammad Shafee Abdullah (Mohamad Hanafiah Zakaria & Noorin Badaruddin with him); DPPs*
For the applicant - Karpal Singh (Ramkarpal Singh, Sangeet Kaur & Zaleha Al-Hayat with him); M/s Karpal Singh & Co

B *Reported by Wan Sharif Ahmad*

JUDGMENT

C **Rohana Yusuf JCA:**

Introduction

[1] Before us in encl. 27a is an application by the applicant/respondent by way of notice of motion to disqualify Dato' Seri Dr
D Mohammad Shafee bin Abdullah's (Dato' Seri Shafee) appointment as Deputy Public Prosecutor to prosecute the appeal in Rayuan Jenayah No. W-05-19-01-2012 against the applicant's acquittal by the Kuala Lumpur High Court. The application is supported by an affidavit affirmed by the applicant, Dato' Seri Anwar Ibrahim, in
E encl. 27b. There were two affidavits in reply deposed by Dato' Seri Shafee in encl. 31 and by Puan Noorin binti Badaruddin in encl. 32 respectively filed on behalf of the respondent.

[2] On 18 September 2013, the date fixed for hearing of this
F application, Encik Karpal Singh, learned counsel for the applicant sought for a postponement of the hearing because he required time to reply to both the affidavits in reply, which were served on the applicant about four days before the hearing date, that was on 12 September 2013. The application for an adjournment was
G objected to by the respondent who then decided to withdraw both affidavits in reply. We accordingly struck off both the affidavits. We proceeded to hear this application, which we have dismissed. We now give our reasons for our decision.

Brief Background

H

[3] The applicant was charged at the Sessions Court in Kuala Lumpur for an offence under s. 377C of the Penal Code. Upon issuance of the certificate of the Public Prosecutor under s. 418A of the Criminal Procedure Code, the case was transferred and
I tried at the High Court Kuala Lumpur. After a trial the applicant was acquitted and discharged and the respondent lodged an

appeal at the Court of Appeal against the said acquittal and discharge. The said appeal in Rayuan Jenayah No. W-05-19-01-2012 is pending at the Court of Appeal.

[4] For the purpose of the appeal, Dato' Seri Shafee was appointed as the Deputy Public Prosecutor by the Attorney General/Public Prosecutor, by a letter dated 2 July 2013 pursuant to s. 376(3) of the Criminal Procedure Code ('CPC'). This application seeks to disqualify and prohibit Dato' Seri Shafee, to act as counsel on behalf of the respondent/Public Prosecutor.

Grounds Of Application

[5] The applicant challenged the appointment on the grounds that:

(i) the appointment of Dato' Seri Shafee under s. 376(3) and s. 379 of the Criminal Procedure Code and art. 145 of the Federal Constitution is not valid, a nullity and is of no effect;

(ii) s. 378 prohibits an advocate to appear on behalf of the Public Prosecutor ('PP') and the appointment of an advocate as a DPP and his appointment under s. 379 is void on account of the doctrine of desuetude; and

(iii) Dato' Seri Shafee was a potential witness in the sodomy trial and would place himself in a position of conflict and is thereby in breach of r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

Appointment Under CPC

[6] It was contended by learned counsel for the applicant Encik Karpal Singh that as a result of the amendment to s. 378 Dato' Seri Shafee, as an advocate, can no longer appear on behalf of the PP in any criminal appeal. He submitted, unlike the repealed provision of s. 378, the current provision prohibits an advocate from appearing. By comparing these two provisions, Encik Karpal Singh argued that the intention of the legislation is made clear, that is to preclude advocate from being appointed to appear on behalf of the Public Prosecutor in criminal proceedings. In the same token he argued s. 379 is no longer applicable and an appointment made under that section is a nullity because s. 379 is no longer valid by the doctrine of desuetude.

[7] Learned counsel invited us to compare the current provision of s. 378 with the repealed provision, to contend that by virtue of the exclusion of the last phrase that '... an advocate expressly authorised in writing by the Public Prosecutor, can appear on behalf of the PP ...' in the current provision, an advocate cannot be appointed under s. 379 to appear on behalf of PP. We reproduced the two provisions below for ease of reference and comparison. The current provision of s. 378 states:

> **378 No one to appear for Public Prosecutor.**
>
> No person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor, a Senior Deputy Public Prosecutor or a Deputy Public Prosecutor.

The repealed provision (prior to 1 April 1998) was as follows:

> **378 No one to appear for Public Prosecutor**
>
> No person shall appear on behalf of the Public Prosecutor on any criminal appeal other than the Public Prosecutor, or a Deputy Public Prosecutor, or a police officer not below the rank of Inspector, or an advocate expressly authorised in writing by the Public Prosecutor or by a Deputy Public Prosecutor, acting on behalf on the Public Prosecutor.

[8] It was pointed out by learned counsel for the applicant that because the current s. 378 no longer contains the last phrase as highlighted above, there is now complete prohibition on an advocate appearing on behalf of the PP.

[9] In our view before we deliberate on the contended prohibition it would first be necessary to examine the powers conferred on the PP in criminal cases generally, to set in motion the relevant provisions on this subject. We will begin with art. 145 of the Federal Constitution. The power of the Attorney General to institute, conduct or discontinue any proceeding for an offence is prescribed by art. 145(3). The Attorney General, following s. 376(1) of the CPC shall be the Public Prosecutor and shall have control and direction of all criminal prosecution.

[10] There are two main provisions that deal with appointment by which the PP is empowered to do in relation to criminal proceedings. First, under s. 376(3) of the CPC, which allows the PP to appoint fit and proper persons to be Deputy Public

Prosecutors. A Deputy Public Prosecutor ('DPP') appointed under s. 376(3) may exercise all or any of the rights and powers vested under the law unless the law expressly states that such power had to be exercised by the PP personally. The other, is under s. 379. Under this provision, by fiat of the PP an advocate may be employed by the Government to conduct criminal prosecution or inquiry or to appear on any criminal appeal on point of law reserved to the PP.

[11] Upon our plain reading of these two provisions, we find that these are modes of appointment envisaged by the CPC. The appointment under s. 376(3) is a direct appointment by the PP whereas, under s. 379 an appointment is by the fiat of the PP. Under s. 379 an advocate given the fiat by the PP shall be deemed to be a public servant.

[12] With respect, we are not able to appreciate the approach taken by Encik Karpal Singh in his argument that merely focuses on the prohibitive provision in s. 378 to contend that an advocate can no longer appear on behalf of the PP.

[13] We take the approach that legislative provisions must first be given their plain meaning and each provisions of the law cannot be interpreted in isolation. Section 378 must be interpreted in the light of the other provisions. By highlighting the prohibition under s. 378 alone, without considering other related provisions, it may lead to an inaccurate conclusion.

[14] It would therefore appear that learned counsel's submission quite simply ignores the existence of s. 376(3), which authorises the appointment of a fit and proper person to be a DPP. The appointment of Dato' Seri Shafee is clearly made under s. 376(3), which we note had escaped the submission of learned counsel both in the oral as well as his written submissions. Section 378 as we understand it, does not prohibit a person who is appointed under s. 376(3) because by that appointment, Dato' Seri Shafee is to all intends and purposes a DPP.

[15] There is no doubt that the PP appointed Dato' Seri Shafee under s. 376(3), as clearly stated in the appointment letter of 2 July 2013. The appointment is specifically made for the purpose of the pending appeal in Rayuan Jenayah No. W-05-19-01-2012. By this appointment Dato' Seri Shafee, is a DPP who may

A exercise all or any of the rights and powers vested under the law except those powers that are reserved specifically to the PP personally. It goes without saying that s. 378 does not prohibit Dato' Seri Shafee who is an appointed DPP.

B **[16]** We now come to s. 379 which learned counsel submitted to be obsolete by the doctrine of desuetude. Before we proceed to deliberate on the submission of learned counsel on this doctrine, we do not see the relevance of s. 379 to the appointment of Dato' Seri Shafee in the present case.

C

[17] That, notwithstanding learned DPPs, (Dato' Mohamad Hanafiah bin Zakaria and Puan Noorin binti Badaruddin with him) on behalf of the respondent, joined in fray of submitting at great length on the non-applicability of the doctrine to Malaysian laws. Suffice for us to state the legal position of this doctrine in
D Malaysia.

[18] The doctrine of desuetude holds that 'if a statue or treaty is left unenforced long enough, the court will no longer regard it as having any legal effect even though it has not been repealed'
E (*Black's Law Dictionary* (9th edn. at p. 513). It entails a legal process by which, through disobedience and lack of enforcement over a long period, a statute may in some legal systems lose its force without express or implied repeal or expiry. In Malaysia the law making process is found in art. 66 of the Federal Constitution.
F The legislative body is conferred with the power to legislate laws, which would necessarily include the power to repeal any law. The doctrine of desuetude does not have a place in this country as the legislative power as well as the legislative making process is enshrined in the Federal Constitution, and it is bestowed on the
G legislative body.

[19] This doctrine has not been applied in any jurisdiction except in Scotland. That too, it was subject to the fact that the law was not in operation for a very considerable period but not by mere
H neglect as stated in the case of *Brown v. Magistrate of Edinburgh* [1931] SLT 456.

[20] Learned counsel for the applicant did not elucidate the reason why this doctrine applies to s. 379 particularly as to the
I length of the period that this provision had been neglected or

abandoned or not in operation, to attract this doctrine. Conversely, he acknowledged that s. 379 was used in the appointment of Dato' Tan Hock Chuan in the public inquiry of *Teoh Beng Hock*'s case. For the purpose of this argument we note that there are two situations that the PP can give his fiat under s. 379. One is to the conduct criminal prosecution and the other is to conduct inquiry. The appointment of Dato' Tan Hock Chuan was for the purpose of public inquiry. This goes to show that s. 379 was invoked during the public inquiry of Teoh Beng Hock in July 2009. Far from being abandoned it is clear that as recent as the year 2009, s. 379 was in fact in operation.

[21] In support of his argument, Encik Karpal Singh sought to distinguish the appointment for the purpose of public inquiry with the appointment of an advocate to conduct criminal proceedings, *albeit* under the same provision. He argued therefore the appointment of Dato' Tan Hock Chuan cannot substantiate a case that s. 379 is still in operation for the purpose of appointing an advocate to conduct criminal appeal. We are not able to accept the argument by learned counsel that the same provision of law can be rendered obsolete for one purpose and not the other. We are of the view that it is rather untenable to suggest that some part of the same provision of the law remains; the other is obsolete by desuetude.

[22] The Supreme Court in *Johnson Tan Han Seng v. PP & Other Appeals* [1977] 1 LNS 38; [1977] 2 MLJ 74 rejected this doctrine and took a position that it has no application in this country. The Supreme Court in deliberating on this doctrine referred to the Scotland case of *Brown v. Magistrate of Edinburgh* [1931] SLT 456, where Lord Mackay explained 'that desuetude requires for its operation a very considerable period, not merely neglect, but of contrary usage of such character as practically to infer such completely established habit of the community as to set up a counter law or established quasi repeal.' After deliberating on this point the Supreme Court in *Johnson Tan* rejected the proposition that an Emergency Ordinance would lapse by effluxion of time or due to change of circumstances. The Supreme Court held that there cannot be an implied repeal of legislation.

[23] Malaysian legislation is perpetual in duration. It continues in force until either it is repealed or it expires. For a legislation to lose its applicability, it must be specifically repealed by the Parliament. It cannot be impliedly repealed simply by the flow of time or inactive use. Even if an Act or any part of an Act is intended to be of temporary duration, the provision for its expiry may be made by the adaptation of any of the techniques available in respect of the commencement of the statutes. Thus, an Act may specify a date when it will expire, it will be followed by an empowering provision to fix such a date would be made. An Act may provide for expiry upon occurrence of some stipulated event. There has been no recognition of the principle where a statute may lose its force merely through disobedience and lack of enforcement over a long period without express or implied repeal or expiry.

[24] This doctrine is also not applicable to English law or to Indian law. The position taken by the English courts is accentuated in the *dictum* of Lord Goddard in *Skyes v. Director of Public Prosecutions* [1962] AC 528 (HL) at p. 567 referring the guidance of Lord Sumner in *Bowman v. Secular Society Ltd.* [1917] AC 406. The English law does not recognise the principle by which a statute may in any circumstances be regarded as obsolete unless tacitly repealed or removed by the Legislature, no matter how long it may have fallen into abandonment or how far its provisions may be in conflict with the altered circumstances of society.

[25] Since s. 379 is not a determining section to this application we do not find it necessary therefore to delve any further except to say that the doctrine of desuetude does not apply to s. 379, and does not apply to the laws in Malaysia.

Potential Witness

[26] The next issue raised by the applicant is whether Dato' Seri Shafee would be a fit and proper person to be appointed under s. 376(3) to prosecute the appeal bearing in mind that he may be a potential witness in the sodomy trial. This argument was premised on the fact that he was offered as a witness to the defence and his statement under s. 112 of CPC was taken. It was deposed in the affidavit of the applicant that Dato' Seri Shafee

would be involved in the narrative of the prosecution's case and would be a material witness. The appointment therefore would pose a case of a conflict of interest and in breach of r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978.

[27] Encik Karpal Singh cited to us a few cases in support of his contention on the issue of conflict of interest. He relied on *Perbadanan Pembangunan Pulau Pinang v. Tropiland Sdn Bhd* [2010] 2 CLJ 1061. The facts in that case involved an application by the plaintiff to disqualify Dato' RK Nathan as a counsel for the defendant on the ground that he was substantially involved in the same case while serving as a High Court Judge in Penang. He was alleged to have presided over the matter as a judge between 8 August 2001 to 25 August 2004 for no less than 13 times. After his retirement he went back to practice and became the lead counsel for the defence in that case. It was held that a strict approach to r. 5(a) of the Legal Profession (Practice and Etiquette) Rules 1978 would be necessary to maintain the best interest of the administration of justice. Accordingly the court must be concerned, not of whether there was a conflict but the perception of the general public of appearance of impropriety and that would suffice.

[28] In *Kayla Beverly Hills (M) Sdn Bhd & Anor v. Quantum Far East Ltd & Ors; Uma Devi R Balakrishnan (Third Party)* [2003] 4 CLJ 587 an advocate and solicitor was disqualified from representing the third party in the suit when he represented the same plaintiff in another related suit. Having found that the third party and the plaintiff were in opposite position and were therefore in conflicting position, the court in *Kayla Beverly Hills* addressed the inability of the counsel in that case to show how he could avoid disclosure of information by parties and how such conflict could be resolved.

[29] The other case cited by the applicant was *RS Muthiah v. Pembinaan Fiba Sdn Bhd* [2004] 2 CLJ 917 where an application to disqualify a counsel from defending the defendant company was allowed. The main grounds of disqualification were because her husband was the managing director and the main witness of the defendant while she represented the plaintiff in another case and that she was also the company secretary of the defendant company. The court held firstly that she would be in breach of

A r. 3(b)(ii) of the Legal Profession (Practice and Etiquette) Rules 1978 namely, it would cause embarrassment where there is some personal relationship between her and a party or a witness in the proceedings. Secondly, she would be in conflict of interest position in view of the fact that she had acted for the plaintiff in the past
B and thirdly she could be in breach of r. 27(a) of the same Rules where she would have pecuniary interest as a company secretary.

[30] We have no hesitation in accepting the principles stated in above cases. Having perused through the cases we find that
C whether a case of conflict of interest in a given case is made out would depends on the facts and circumstances of each case. What we note in each of the cases above the involvement by the counsel were seen obvious and we have no doubt that they would have compromised the administration of justice.

D

[31] Returning to the facts of the present application, we are mindful that the appeal to be prosecuted in the present case would purely be deliberated on the appeal records before the court. No witness would any longer be required. We further note
E that after a full trial at the High Court, Dato' Seri Shafee was neither called by the prosecution nor defence. It would not be wrong then to infer from that fact alone that he was therefore not a material witness to unfold the narratives of the prosecution's case. The fact that he was offered as a defence witness was
F because his statements were recorded under s. 112 CPC. Even if his statements was taken under s. 112 CPC it does not *ipso facto* make him a material witness. The prosecution is duty bound to offer persons whose statements were recorded under s. 112 simply to avoid adverse inference under s. 114(g) of the Evidence Act 1950.

G

[32] Having perused his statements under s. 112, we find that they were recorded in relation to his presence at the house at the time when Mohd Saiful Bukhari met the Prime Minister, Dato' Sri Najib. We do not see how he would be relevant to a sodomy
H charge against the applicant. The facts of which in our view is too fleeting to bear any relevance to a sodomy charge. Our view is further fortified by the fact that both the prosecution as well as the defence did not find him to be a relevant witness in the trial.

I

[33] In the course of his oral submission learned counsel for the applicant suggested that the testimony of Dato' Seri Shafee would be relevant to the defence of conspiracy anchored by the applicant in his defence. If he had been a material witness to the defence, it is somewhat odd that the trial had gone passed, without his evidence been adduced.

[34] The fact that the trial is now over and neither the prosecution nor the defence had adduced his evidence, would dispel any thought of him being a material witness. It had become amply clear that Dato' Seri Shafee is not a material witness to both the prosecution as well as the defence case.

[35] We agree with the submission of learned DPP that the position of Dato' Seri Shafee to prosecute this appeal is no difference from the role of Encik Karpal Singh as a defence counsel in *PP v. Dato' Seri Anwar Ibrahim & Anor* [2001] 3 CLJ 313; [2001] 3 MLJ 193. In relation to that case, Encik Karpal Singh disclosed in Dewan Rakyat on 22 October 1997 that the complainant and one of the witnesses in that case had met him regarding the applicant over the case. His statement was also recorded by the police. That would have made him a potential witness. He however represented the applicant as counsel throughout that trial. By comparison in our view, Encik Karpal Singh's role then is not too dissimilar than the facts referred to in respect of this issue. We say this because despite him being a potential witness Encik Karpal Singh acted as the counsel for the applicant during the trial. Whereas in the pending appeal the proceeding would proceed without witness.

[36] In the final analysis, we do not find any merit in the grounds put forth in this application, and it was for all the above reasons that we dismissed the application in encl. 27a.